

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OSWALDO ENRIQUE TOBAR, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA,
Defendant.

CASE NO. 07cv817 WQH (WMc)
ORDER

HAYES, Judge:

The matter before the Court is the mandate issued by the Court of Appeals for the Ninth Circuit.

I. Background

On May 4, 2007, Plaintiffs¹ initiated this action by filing a Complaint against the United States. (ECF No. 1). The Complaint alleged that on October 5, 2005, the United States Coast Guard Law Enforcement Detachment unlawfully and negligently stopped, searched, and detained Plaintiffs, residents of Ecuador, in international waters destroying the cargo and fish

¹ The named Plaintiffs are: Oswaldo Enrique Tobar, Francisco Gabriel Yole Arteago, Fausto Lupercio Arias Castaneda, Frabricio Bayron Cedeno, Joffre Johnny Cedeno, Lindon Cleofe Cedeno, Ramon Eliades Ramon Velez Cedeno, Daniel David Quimi Chalen, Pablo Eduardo Lucas Conforme, Ramon Eduardo Pilligua Conforme, Ciro Mariano Lopez Mero, Pedro Manuel Lopez Mero, Jose Eduardo Lucas Mero, Luis Antonio Penafiel Mero, Pedro Jose Reyes Mero, Telmo Arcadio Chica Obando, Luis Miguel Cedeno Pico, Jaime Gustavo Palma Pinargote, Yardy Klever Flores Segovia, Pacho Hernandez Solorzano, Carlos Wilfrido Veliz Velez, Jose Luis Zambrano Zambrano, Carlos Orlando Velez Zambrano, Rosa Carmelina Zambrano Lucas, Junior Ivan Pico Alava, Segundo Matias Zambrano Alonzo.

1 owned by Plaintiffs. The Complaint asserted claims under the Federal Tort Claims Act
 2 (“FTCA”), 28 U.S.C. §§ 1346(b) and 2661, *et seq.*, the Suits in Admiralty Act (“SAA”), 46
 3 U.S.C. §§ 30901-30918, and the Public Vessels Act (“PVA”), 46 U.S.C. §§ 31101-31113.

4 On August 31, 2007, the United States filed a Motion to Dismiss for Lack of Subject
 5 Matter Jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The
 6 United States contended in part that the Suits in Admiralty Act (“SAA”) does not provide a
 7 basis for subject matter jurisdiction in this action because the discretionary function applies
 8 retaining sovereign immunity for the United States.

9 On September 5, 2007, Plaintiffs filed a Motion to Compel Discovery and contended
 10 that “Defendant’s motion relies on jurisdictional issues which are so intertwined with
 11 substantive issues that discovery is needed to oppose facts raised by the motion.” (ECF No.
 12 24 at 2). “Plaintiffs contend [ed that] they require additional information about facts
 13 underlying the discretionary function defense” *Id.*

14 The Magistrate Judge denied the Motion to Compel stating: “[the Court] finds that such
 15 discovery is not necessary to demonstrate facts in opposition to the jurisdictional issues raised
 16 in Defendant’s 12(b)(1) motion.” *Id.* at 3. The Magistrate Judge stated that “Plaintiffs have
 17 confirmed ... that the government has complied with the Court’s order [to produce and
 18 exchange the actual documents identified in their Rule 26 disclosure lists].” *Id.* The
 19 Magistrate Judge stated that “[f]rom the numerous exhibits submitted by Plaintiffs in support
 20 of their motion to compel, it is clear that Plaintiffs have ample material with which to oppose
 21 Defendant’s motion to dismiss.” *Id.*

22 On January 15, 2008, this Court issued an order stating:

23 [A] well-recognized exception to the SAA’s general waiver of the
 24 sovereign immunity is the “discretionary function” exception. *Earles*
v. United States, 935 F.2d 1028, 1032 (9th Cir. 1991). The Supreme
 25 Court has articulated two factors (the “*Gaubert* factors”) for courts to
 26 consider when determining whether the discretionary function
 27 exception applies to a particular case: (1) whether the nature of the
 28 challenged conduct involved “an element of judgment or choice,” and
 (2) whether “social, economic or political policy” considerations are
United States v. Gaubert, 499 U.S. 315, 322-23 (1991); *see also* *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

...

Plaintiffs allege that the Coast Guard unlawfully stopped,

1 searched and seized Plaintiffs' vessel suspected of drug smuggling. To
 2 support the contention that this allegedly unlawful conduct was
 3 discretionary, the United States submitted the Declaration of Brad J.
 4 Kieserman, the Chief of Operations Law at U.S. Coast Guard
 5 Headquarters, who attests that “[a]t all times, the Coast Guard is
 6 operating under its authority in 14 U.S.C. § 89 whenever it conducts
 7 maritime law enforcement,” and that “the decision to conduct a
 8 boarding, the personnel who shall comprise the boarding team, and the
 9 manner of conducting the boarding is always left to the discretion of the
 10 on-scene Commander or Officer in Charge and Boarding Officer.”
 11 *Kieserman Decl.* ¶¶ 8, 11. The first *Gaubert* factor is satisfied because
 12 the only evidence in the record demonstrates that the decision to stop,
 13 board, search and seize suspected drug smuggling vessels and the
 manner in which government agents conduct such activity is
 discretionary. *See* 14 U.S.C. § 89(a); *Mid-South Holding Co.*, 225 F.3d
 at 1205; *Kieserman Decl.* ¶¶ 8, 11. The second *Gaubert* factor is
 satisfied because the challenged conduct implicates “social, economic
 or political policy considerations” in light of Congress’ declaration that
 “trafficking in controlled substances aboard vessels is a serious
 international problem and universally condemned” and that “such
 trafficking presents a specific threat to the security and societal well-
 being of the United States.” *See B&F Trawlers, Inc.*, 841 F.2d at 631
 (quoting 46 U.S.C. § 1902). The Court concludes Plaintiffs have failed
 to establish subject matter jurisdiction under the SAA because the
 discretionary function exception applies, retaining sovereign immunity.

14 (ECF No. 27 at 4-8).

15 On February 5, 2008, Plaintiffs filed a First Amended Complaint. (ECF No. 28). The
 16 First Amended Complaint asserted that subject matter jurisdiction exists pursuant to: (1) the
 17 PVA; (2) the SAA; (3) the Alien Tort Statute, 28 U.S.C. § 1330; (4) the Convention on the
 18 Law of the Sea; (5) the International Covenant on Civil and Political Rights (“ICCPR”); and
 19 (6) a bilateral treaty between Ecuador and the United States concerning the use of an Air Force
 20 base at Manta, Ecuador.

21 On June 5, 2008, the United States filed a Motion to Dismiss for Lack of Subject Matter
 22 Jurisdiction.

23 On August 19, 2008, the Magistrate Judge issued an order staying discovery. (ECF No.
 24 56). The Magistrate Judge stated: “Plaintiffs ... argue that discovery is needed to prove-up
 25 more facts to substantiate a waiver of sovereign immunity.” *Id.* at 2 (quotation omitted). The
 26 Magistrate Judge stated: “This Court has reviewed the Declaration [of the individual Plaintiffs
 27 seek to depose] and finds that a deposition of the declarant is not necessary to discover facts
 28 pertinent to a waiver of sovereign immunity.” *Id.* at 4. The Magistrate Judge explained that
 the declarant identified the bilateral lease agreement, but “the bilateral lease agreement speaks

1 for itself: it is not a treaty.” *Id.* The Magistrate Judge concluded that “no discovery is
 2 appropriate at this time because the character and effect of the bilateral lease agreement can
 3 be determined as a matter of law” *Id.* at 4-5.

4 On September 19, 2008, this Court issued an order stating in part:

5 The Court's January 15, 2008 order concluded that “Plaintiffs have
 6 failed to establish subject matter jurisdiction under the SAA because
 7 the discretionary function exception applies, retaining sovereign
 8 immunity.” (ECF No. 27 at 8-9). The FAC does not allege additional
 9 facts with respect to the SAA. Plaintiffs' opposition to the instant
 10 Motion to Dismiss restates the arguments made in their opposition to
 11 the United States' initial motion to dismiss with respect to why the
 12 discretionary function should not apply to this action. The Court
 13 already considered and rejected these arguments in the January 15,
 14 2008 order. The Court concludes that the SAA is not a valid basis for
 15 subject matter jurisdiction because the discretionary function exception
 16 to the United States' waiver of sovereign immunity under the SAA
 17 applies, retaining the sovereign immunity of the United States under the
 18 SAA.

19 (ECF No. 57 at 7-8). The Court dismissed the First Amended Complaint for lack of subject
 20 matter jurisdiction.

21 On September 22, 2008, judgment was entered. On October 22, 2008, Plaintiffs filed
 22 a notice of appeal from the order dismissing the First Amended Complaint for lack of subject
 23 matter jurisdiction. (ECF No. 59).

24 On April 21, 2011, the Court of Appeals for the Ninth Circuit issued an order affirming
 25 in part, vacating in part, and remanding the case to this Court. On June 16, 2011, the Court of
 26 Appeals issued its formal mandate. (ECF No. 70).

27 The Court of Appeals affirmed this Court's Order that the Alien Tort Statute, the
 28 Convention on the Law of the Sea, the ICCPR, and the bilateral treaty concerning the use of
 an Air Force base at Manta, Ecuador do not confer subject matter jurisdiction in this case.
 With regard to the PVA and SAA, the Court of Appeals stated:

29 [The PVA and SAA provide] an explicit waiver of sovereign
 30 immunity. The PVA waives sovereign immunity for suits for
 31 “damages caused by a public vessel of the United States.” 46 U.S.C.
 32 § 31102(a)(1). But the PVA contains a reciprocity requirement: A
 33 national of a foreign country may sue under the PVA only if the
 34 government of that foreign country would permit a United States
 35 national to bring the same suit in its courts. *Id.* § 31111. The SAA
 36 waives sovereign immunity, subject to some exceptions, in admiralty
 37 cases when a civil action could otherwise be brought if the United
 38 States were not a party. *Id.* § 30903(a); *see Earles v. United States*,

1 935 F.2d 1028, 1032 (9th Cir. 1991) (recognizing a “discretionary
 2 function exception” to that waiver).

3 ...

4 The [Supreme] Court concluded that a plaintiff who brings an
 5 admiralty claim that falls within the scope of the PVA must meet the
 6 PVA’s reciprocity requirement, even though the text of the SAA
 7 suggests that a claim brought under the SAA need not meet that
 8 requirement. *[United States v. United Continental Tuna Corp.*, 425
 9 U.S. 164, 181 (1976)].

10 ...

11 The PVA’s waiver of sovereign immunity is conditioned on the
 12 following reciprocity requirement: A national of a foreign country may
 13 not maintain a civil action under this chapter unless it appears to the
 14 satisfaction of the court in which the action is brought that the
 15 government of that country, in similar circumstances, allows nationals
 16 of the United States to sue in its courts. 46 U.S.C. § 31111. The district
 17 court held that the documents submitted by Plaintiffs—an affidavit by
 18 an Ecuadorian lawyer and a translated copy of the Ecuadorian
 19 constitution—were insufficient to establish that reciprocity exists. We
 20 agree.

21 The documents say nothing about sovereign immunity or about
 22 suits for damages caused by the Ecuadorian government.
 23 Non-Ecuadorians may have equal access to Ecuadorian courts and a
 24 guarantee of due process, but those issues do not speak to whether
 25 Ecuador would allow a United States citizen to sue the Ecuadorian
 26 government “in similar circumstances.” *Id.* The documents are simply
 27 inapposite. Indeed, the affidavit from the Ecuadorian lawyer does not
 28 state that any party can sue the Ecuadorian government. The
 29 documents demonstrate that a foreign citizen can bring suit to the same
 30 extent as an Ecuadorian citizen, but the documents do not address the
 31 key issue here: whether the Ecuadorian government would waive
 32 sovereign immunity in similar circumstances.

33 The failure of Plaintiffs’ documents to demonstrate reciprocity
 34 does not necessarily end the inquiry. Under Federal Rule of Civil
 35 Procedure 44.1, “[i]n determining foreign law, the court may consider
 36 any relevant material or source, including testimony, whether or not
 37 submitted by a party or admissible under the Federal Rules of
 38 Evidence. The court’s determination must be treated as a ruling on a
 39 question of law.” *See Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1216 (9th
 40 Cir. 2002)... In *Universe Sales*, 182 F.3d at 1038, we elaborated that,
 41 “pursuant to Rule 44.1, courts may ascertain foreign law through
 42 numerous means,” including through the court’s “own research.”

43 Here, the district court held that, because Plaintiffs’ documents
 44 did not establish reciprocity, Plaintiffs failed to meet their burden of
 45 demonstrating reciprocity. We are uncertain whether a plaintiff bears
 46 the burden of establishing the content of foreign law for purposes of
 47 the PVA’s reciprocity requirement. Compare Fed. R. Civ. P. 44.1
 48 (instructing that the district court’s determination of foreign law is
 49 treated as a ruling on a question of law) and *Nicholas E. Vernicos
 50 Shipping Co. v. United States*, 349 F.2d 465, 467 (2d Cir. 1965)
 51 (conducting an extensive inquiry into the content of Greek law for
 52 purposes of determining reciprocity under 46 U.S.C. § 31111), with

1 *Lauro v. United States*, 162 F.2d 32, 34-35 (2d Cir. 1947) (rejecting,
 2 before the promulgation of Rule 44.1, a claim under the PVA brought
 3 by an Italian plaintiff because “[s]he offered no proof of Italian law in
 4 the District Court”). But even assuming that Plaintiffs bear the burden
 5 here, the district court apparently did not recognize that, in its
 6 discretion, it could inquire further into the content of Ecuadorian law.
 7 We therefore vacate and remand. *Cf. United States v. Davis*, 428 F.3d
 8 802, 803 (9th Cir. 2005) (“Because the district court did not believe it
 9 had [certain] discretion, we vacate and remand for reconsideration . . .”).
 10

11 Whether reciprocity exists under Ecuadorian law remains
 12 undetermined. Notably, the attorney for the United States asserted at
 13 oral argument that he did not know whether such reciprocity exists. In
 14 these circumstances, we find it appropriate to give the parties and the
 15 court an additional opportunity to determine this threshold question.
 16 On remand, the court may instruct the parties to provide additional
 17 evidence, through testimony or other means; the court may conduct its
 18 own research; and the court may undertake any other inquiry
 19 consistent with Rule 44.1 to determine whether reciprocity exists
 20 under Ecuadorian law.

21 (ECF No. 70 at 9, 14-16).

22 On July 6, 2012, this Court ordered that discovery and supplemental briefing regarding
 23 whether reciprocity exists under Ecuadorian law. The parties engaged in discovery.

24 On November 15, 2011, Plaintiffs submitted supplemental briefing. On November 21,
 25 2011, the United States submitted supplemental briefing. On November 22, 2011, Plaintiffs
 26 filed an objection to the supplemental briefing filed by the United States.

27 On January 5, 2012, this Court ordered the parties to file English-language translations
 28 of every Constitution or Constitutional provision, law, statute, or legal authority upon which
 29 the parties rely. On February 1, 2012, the United States submitted supplemental documents.
 30 On February 3, 2012, Plaintiffs filed supplemental documents.

31 On March 13, 2012, the Court issued an order requiring further briefing by the parties.
 32 The Court stated that the United States had asserted in part:

33 [R]egardless of the outcome of any inquiry into reciprocity, by the parties or by
 34 this Court, such an outcome has no effect on whether subject matter jurisdiction
 35 exists. This Court’s ruling that there is no waiver of sovereign immunity, and
 36 therefore no subject matter jurisdiction, based on the discretionary function
 37 exception to any partial waiver of sovereign immunity in the PVA and/or SAA
 38 was affirmed and not disturbed by the panel. The outcome of the reciprocity
 39 issue has become moot. This Court need not proceed with the issue of whether
 40 reciprocity exists. Subject matter jurisdiction is absent in either case.

41 (ECF No. 95 at 4) (citing ECF No. 90 at 5). The Court stated: “In light of the dispositive
 42 nature of the claim of sovereign immunity, the Court will order the parties to fully brief the

1 issue of whether the discretionary function exception applies to the Public Vessels Act and
2 would require dismissal of this action independent of any ruling as to reciprocity.” *Id.* at 5.
3 This Court ordered the parties to file memorandums addressing the issue of whether the
4 discretionary function exception applies to the PVA and whether the discretionary function
5 exception would require dismissal of this action independent of any ruling as to reciprocity.

6 On March 26, 2012, the United States submitted a supplemental memorandum. On May
7 2, 2012, Plaintiffs submitted a supplemental memorandum.

8 **II. Discussion**

9 **A. PVA Discretionary Function Exception**

10 The United States contends that subject matter jurisdiction is lacking on the grounds that
11 the discretionary function exception applies to this case retaining sovereign immunity for the
12 United States. The United States contends that the discretionary function exception to the
13 waiver of sovereign immunity applies equally to the PVA and the SAA. The United States
14 contends that the Court’s prior findings regarding the applicability of the discretionary function
15 exception to the SSA should also apply to the PVA claim retaining sovereign immunity for the
16 United States.

17 Plaintiffs contend that “the case was sent back to the District Court for a determination
18 [of whether] the U.S. Coast Guard violated its own regulations[; b]ecause, if it did, then the
19 discretionary function [exception does] not apply.” (ECF No. 99 at 9). Plaintiffs contend that
20 the court erred in denying discovery to Plaintiffs on the grounds that jurisdictional issues and
21 substantive issues are “so intertwined that the question of jurisdiction is dependent on
22 resolution of the factual issues going to the merits” *Id.* at 11. Plaintiffs contend that
23 discovery is necessary to determine “the agreement between the agents of the United States
24 and the Ecuadorian government, and what effect that violation of the Coast Guard’s regulations
25 and agreements with the Ecuadorian government had on Defendant’s discretionary function
26 defense” *Id.* at 14.

27 The United States, as a sovereign, is immune from suit. *United States v. Mitchell*, 445
28 U.S. 535, 538 (1980). A federal district court only has subject matter jurisdiction over a suit
against the United States when sovereign immunity has been waived. *Argentine Republic v.*

1 *Amerada Hess Shipping Corp.*, 488 U.S. 428, 435 (1989). “It is axiomatic that Congressional
 2 waiver of sovereign immunity is a prerequisite to any suit brought against the United States.”
 3 *Roberts v. United States*, 498 F.2d 520, 525 (9th Cir. 1974). A waiver of sovereign immunity
 4 as contained in any statute “will be strictly construed, in terms of its scope, in favor of the
 5 sovereign.” *Lane v. Pena*, 518 U.S. 187, 192 (1996).

6 The PVA incorporates the consistent provisions of the SAA by stating: “A civil action
 7 under this chapter is subject to the provisions of chapter 309 of this title [the SAA] except to
 8 the extent inconsistent with this chapter.” *See* 46 U.S.C. § 31103. “Although neither [the PVA
 9 nor the SAA] contain[] an express discretionary function exception, it has been implied into
 10 both [the PVA and the SAA].” *Thames Shipyard and Repair v. United States*, 350 F.3d 247,
 11 254 (1st Cir. 2003); *see also Cranford v. United States*, 466 F.3d 955, 958 (11th Cir. 2006)
 12 (holding that the discretionary function exception applies to both the PVA and SAA);
 13 *Baldassaro v. United States*, 64 F.3d 206, 208 (5th Cir. 1995) (holding that the discretionary
 14 function exception applies to the SAA); *B & F Trawlers, Inc. v. United States*, 841 F.2d 626,
 15 630 (5th Cir. 1988) (“We and other circuit courts have for some years incorporated this
 16 [discretionary function] exception into the [SAA] and PVA.”) (citations omitted); *U.S. Fire
 17 Ins. Co. v. United States*, 806 F.2d 1529, 1535 (11th Cir. 1986) (holding that the discretionary
 18 function exception applies to the PVA) (abrogated on other grounds by *U.S. v. Gaubert*, 499
 19 U.S. 315, 326 (1991)).

20 In this case, the Magistrate Judge concluded that jurisdictional discovery is not
 21 necessary. *See* (ECF Nos. 24, 56). This Court held that Plaintiffs failed to establish subject
 22 matter jurisdiction under the SAA because the discretionary function exception applies
 23 retaining sovereign immunity for the United States. *See* (ECF Nos. 27, 57). The Court of
 24 Appeals for the Ninth Circuit affirmed the Court’s holding. The Court finds that the
 25 discretionary function exception applies to the PVA claim as well. The Court concludes that
 26 Plaintiffs failed to establish subject matter jurisdiction under the PVA because the
 27 discretionary function exception applies retaining sovereign immunity for the United States.

28 **B. Reciprocity**

Plaintiffs contend that Ecuador has an “open courts” provision in its Constitution which

1 “guarantees foreigner’s the same rights as Ecuadorians” in court and “allows the state to be
 2 held liable for arbitrary arrest and detention and miscarriage of justice.” (ECF No. 89 at 3)
 3 (citing Constitution of Ecuador, 1998, arts. 11, 13, and 17). Plaintiffs contend that the
 4 Ecuadorian Constitution also provides that “Ecuador in its relation with the international
 5 community, it is declared that international law is the standard of conduct and reciprocity
 6 promotes the settlement of disputes by methods legal and peaceful.” *Id.* (citing Constitution
 7 of Ecuador, 1998, art. 4). Plaintiffs contend that “sovereign immunity does not exist under
 8 Ecuadorian law” *Id.* at 5.

9 Plaintiffs have submitted the declaration of Nestor Arbito, former Ecuadorian Minister
 10 of Justice and Human Rights, who states: “The concept of any immunity for the government
 11 for wrongs committed by its agents simply does not exist in Ecuador.” (ECF No. 8-1 at 2).
 12 Plaintiffs have submitted the declaration of Karina Peralta Velasquez, a former Deputy
 13 Minister of the Ministry of Justice and Human Rights in Ecuador, who states that “the term
 14 ‘sovereign immunity’ has a different meaning” in the Ecuadorian legal system. *Id.* at 6.
 15 Velasquez states that Ecuador has “statutory law, and no restriction, which may impede any
 16 individual (national or foreigner) to sue the government.” *Id.* Plaintiffs have submitted the
 17 declaration of Dr. Hector Villagran Lara, attorney, professor, and “expert on Ecuadorian
 18 Constitutional and International law,” who states: “The legal concept of sovereign immunity
 19 for civil cases ... does not exist under Ecuadorian law” *Id.* at 10.

20 The United States contends that “the issue is not simply whether non-Ecuadorians can
 21 file a suit in that country’s court ..., but whether a suit in ‘similar circumstances’ to the one
 22 here can be filed, *i.e.*, suit by a United States citizen against a military branch of the
 23 Ecuadorian government for damages by a public/military vessel.” (ECF No. 90 at 9-10). The
 24 United States contends that the affidavits submitted by Plaintiffs “state nothing about suits
 25 against the Ecuadorian military” *Id.* at 10. The United States contends that “case law in
 26 this country shows that Ecuador has officially waived sovereign immunity in a number of cases
 27 ... [w]hen sovereign immunity is waived by a country, the inescapable conclusion is that there
 28 existed sovereign immunity to waive.” *Id.* at 18 n.4 (citing *Jota v. Texaco*, 157 F.3d 153, 163
 (2d Cir. 1998); *Aquamar, SA v. Del Monte*, 179 F.3d 1279, 1300 (11th Cir. 1999)).

1 The United States has submitted the expert report of Dr. Ricardo Vaca Andrade who
2 states: “[T]here is nothing in the Constitution of Ecuador ... which would absolutely guarantee
3 reciprocity” in this case. (ECF No. 90-3 at 5). The United States has submitted a copy of an
4 English translation of the 1998 Constitution of Ecuador which states: “The people of Ecuador
5 ... proclaim their will to consolidate the unity of the Ecuadorean nation ... invoke the protection
6 of God and in the exercise of its sovereignty, establish in this Constitution” (ECF No. 93
7 at 3). The 1998 Constitution of Ecuador states: “Ecuador is a social State ruled by law; it is
8 sovereign, unitary, independent, democratic, multicultural and multi-ethnic. Sovereignty
9 lies with the people, whose will is the basis of authority, exercised through public bodies using
10 democratic means as provided for by this constitution.” *Id.* Article 4 of the 1998 Constitution
11 of Ecuador states: “Ecuador, in its relationship with the international community: ... Declares
12 international law as the norm of conduct between nations in their reciprocal relations and
13 promotes resolving controversies by legal and peaceful means.” *Id.* at 4. Article 13 of the
14 1998 Constitution of Ecuador states: “Foreign persons shall enjoy the same rights as
15 Ecuadoreans, with the limitations established by the Constitution and the law.” *Id.* at 5.
16 Article 17 of the 1998 Constitution of Ecuador states: “The State shall guarantee all of its
17 inhabitants, without any discrimination whatsoever, the free and effective exercise and
18 enjoyment of the human rights set forth in this Constitution and in the declarations, pacts,
19 agreements and other current international instruments.” *Id.* Article 23 of the 1998
20 Constitution of Ecuador states: “Without prejudice to the rights set forth in this Constitution
21 and in the current international instruments, the State shall recognize and guarantee persons
22 the following: ... Equality under the law.” *Id.*

23 Ecuador is a sovereign nation. *See* Constitution of Ecuador, 1998; *Jota*, 157 F.3d at 163
24 (remanding case to district court stating that “Ecuador’s previously asserted position on waiver
25 of sovereign immunity [less than complete waiver] justified the earlier denial of intervention,
26 [however upon remand] Ecuador will have the opportunity to revise its position [to make a
27 complete waiver of sovereign immunity] if it is so inclined”); *Aquamar*, SA, 179 F.3d at 1300
28 (holding that an ambassador’s “waiver of Ecuador’s sovereign immunity was complete and
effective”). The evidence may demonstrate that non-Ecuadorians have equal access to

1 Ecuadorian courts and a guarantee of due process, but the evidence does not show that Ecuador
2 would allow a United States citizen to sue the Ecuadorian government in circumstances similar
3 to this case. The evidence does not demonstrate that Ecuador waives its sovereign immunity
4 in admiralty actions brought in Ecuador's courts by foreigners for damages caused by a public
5 vessel of Ecuador. The Court concludes that the PVA is not a valid basis for subject matter
6 jurisdiction because reciprocity does not exist with Ecuador.

7 **III. Conclusion**

8 IT IS HEREBY ORDERED that Plaintiffs failed to establish subject matter jurisdiction
9 under the Public Vessels Act because the discretionary function exception applies retaining
10 sovereign immunity for the United States. The Public Vessels Act is not a valid basis for
11 subject matter jurisdiction because reciprocity does not exist with Ecuador which is a
12 jurisdictional prerequisite to the waiver of sovereign immunity under the Public Vessels Act.

13 DATED: June 13, 2012

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15 **WILLIAM Q. HAYES**

16 United States District Judge

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